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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1510

JACK M. WEATHERFORD, Individually and in his official capacity as an agent of the South Carolina Law Enforcement Division, PETE STROM, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division,

Petitioners,

vs.

BRETT ALLEN BURSEY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether respondent was denied effective assistance of counsel and a fair state court trial where a paid informer posing as a co-defendant infiltrated the defense

camp, affirmatively misled respondent as to his true identity, participated in attorney-client discussions, collaborated with the prosecution, subsequently testified against the respondent at the state trial, and where respondent was demonstrably prejudiced by the deceptive practices?

II. Whether the chief of the South Carolina State Law Enforcement Division is liable for violations of respondent's right to counsel and a fair trial where his own decisions directly caused the deprivations?

STATEMENT

Jack Weatherford was hired by Pete Strom, Chief of the South Carolina State Law Enforcement Division (SLED), in August, 1969, as an undercover agent. His assignment was to infiltrate the University of South Carolina and keep Strom informed about what was happening on the campus.

As part of his SLED duties, Weatherford joined a University chartered discussion group known as AWARE where he met Brett Bursey, also a student at the University. The two subsequently became close friends. As a result of their mutual opposition to the war in Vietnam, Weatherford, Bursey and

several others met on March 19, 1970, and planned a demonstration before the Richland County Selective Service Board to celebrate National Anti-Draft Week. The group decided to go to the draft board later that night, paint anti-war symbols on the building and throw a bottle of paint and a brick with an anti-war note tied to it through a window. After the meeting, Weatherford notified Strom of the plan, but neither made any attempt to stop it.[1]

Weatherford, Bursey and one Greg Merrick carried out the defacing of the local board in the early A.M. hours of March 20, 1970. A fourth person, Dan Bolding, drove the getaway car. Both Bursey and Weatherford painted a peace symbol on a wall and each threw a brick. Weatherford subsequently called SLED and made arrangements for his and Bursey's arrest. SLED agents arrested the two later during the day as they were attending a Student Affairs Committee Meeting at the University. They were handcuffed together and taken to the Richland County Sheriff's office. Bursey remained in jail for approximately 12 days due to difficulties in raising his $12,500 bond. Weatherford was released to fellow agents within hours of his arrest and taken out of town for several days. In the meantime, Bursey, who was still in custody, was told by SLED agents that Weatherford was also in jail. Following Bursey's release

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1. Strom didn't "instruct him to stop it ... [because] we never would have a violation and all the thieves and crooks would be going wild."

he and Weatherford met and Weatherford confirmed the fabrication that he had been in jail for several days before making bail. Weatherford and Bursey were later indicted as co-defendants by the county solicitor for malicious destruction to real and personal property.

To maintain the ruse that Weatherford was a bona fide co-defendant, the solicitor made arrangements for a local attorney to appear to represent Weatherford. "I told him [the attorney] I didn't want anybody, including people in his office to know that this man was an undercover agent."

Bursey's attorney met with Weatherford's attorney to discuss their clients' cases. Weatherford's lawyer "agreed there was an informant" but "had no idea who the informant was." He indicated that he would seek a separate trial for his client.

Bursey and Weatherford met with Bursey's attorney on several occasions. On at least two of these Bursey and Weatherford's trials were discussed in detail. The first meeting was arranged by Bursey and took place at his home in mid-April shortly after his release from jail. The lawyer and the co-defendants discussed the pending cases generally and whether or not there might be an informer, Weatherford's representation and his plans to seek a severance. Weatherford stated that an informer could be involved and expressed the opinion that perhaps Merrick was an agent since he had never been arrested and charged.

The three also discussed whether or not Weatherford might be approached by law enforcement officers to secure testimony against Bursey in consideration of leniency for Weatherford's brother who was at that time serving a sentence for burglary. Weatherford denied that he had been approached by law enforcement officers and stated that he would not cooperate with them. The three also discussed trial tactics, including the testimony Merrick might give and the testimony the state would have available if Merrick did not testify.

Sometime after the meeting and prior to Bursey's trial Weatherford went to the beach for a weekend vacation with fellow SLED agents. While there he thought he was seen by a friend of Bursey's. To preserve the co-defendant deception, Weatherford got in touch with Bursey upon his return to the University and told him that his family and friends of his family had insisted that he discuss his case with the police; accordingly, he had met with SLED agents at a seaside resort at Hilton Head, South Carolina; they urged Weatherford to testify against Bursey but he had refused to do it. Weatherford assured Bursey that he would not cooperate with the prosecution.

The second formal attorney-client meeting in which Weatherford participated took place at the home of a mutual friend shortly before Bursey's July 27, 1970, trial. The matters discussed at the first meeting were discussed again, as well as legal strategies and tactics which had been developed during the interim. At that time it was known that Merrick was

out of the country and could not be present as a witness at the trial. The discussion turned to whom the witnesses might be against Bursey. Weatherford again denied that he would testify against Bursey or be a witness for the state. He also agreed not to be present in the courtroom on the day of Bursey's trial. Bursey and Weatherford had discussed the possibility of Weatherford's being subpoenaed but concluded that in such instance he would have available the fifth amendment privilege against self-incrimination. Final defense strategy was also discussed at the meeting, that in Merrick's absence and the absence of testimony from Weatherford the state would not be able to prove by direct testimony that Bursey was present at the local board. It was also determined that under the circumstances Bursey would not testify.

Prior to his state trial, Bursey filed a motion for discovery of the identity of informants. The motion was denied. When Bursey's case was called for trial, the prosecution's first witness was Weatherford. He implicated Bursey fully and directly in the crime charged.

Weatherford's testimony and his disclosure as an informer dramatically altered the defense tactics. It was determined that Bursey would have to testify. As for Bursey's attorney, the revelation of Weatherford's identity "completely changed the complexion of the case in a matter of a few minutes. It -- needless to say -- disoriented me" and impaired his ability to conduct the defense. Bursey was convicted of malicious destruction to real property and sentenced to eighteen months imprisonment.

Weatherford's general duties as an agent at the University remained the same following Bursey's arrest, and his original instructions were not modified in any way. As part of his continuing role of undercover agent, Weatherford helped trash the Administration Building in protest over the Kent State killings and the escalation of the war in Vietnam. He also applied for membership in the Venceremos Brigade and continued to counsel with his co-defendant. On one occasion he advised Bursey to jump bail and flee the jurisdiction.

During the time Weatherford was an agent, he and Strom kept in constant contact with each other, usually by telephone. They also conferred when Weatherford came to SLED headquarters every other week to pick up his pay check. Both Weatherford and Strom knew from the beginning that Weatherford might be a witness against Bursey. Weatherford "was prepared to be called into Court at any time for any case." Strom understood that "at some point in time on all your big cases . . . you have to let them testify, and then you give them a regular job and give them another assignment."

After conviction and service of sentence, Bursey brought the instant action for damages under 42 U.S.C. §1983. The district court dismissed the complaint, ruling that Bursey had not been denied constitutional protection and that there was no evidence connecting Strom with any of the acts committed by Weatherford. The court of appeals reversed on the grounds that Bursey's right to counsel and a fair

trial had been abridged where the state "knowingly arranges or permits intrusion into the attorney-client relationship." The court found that "Strom's own decisions directly caused the violation of Bursey's constitutional rights" and remanded the case for determination if he and Weatherford were entitled to the benefit of a "Strickland-type good faith defense." App. A at 21, 24-5.

ARGUMENT

I. The Decision Below is Plainly Correct.

The intrusion upon the attorney-client relationship in this case was even more egregious than those condemned in Black v. United States, 385 U.S. 26 (1966), and O'Brien v. United States, 386 U.S. 345 (1967), upon which the lower court relied. In Black, the Solicitor General advised the Court that prosecuting attorneys had been in possession of monitored attorney-client conversations even though the prosecuting attorneys were unaware that the surreptitious monitoring included attorney-client matters. Nonetheless, the conviction was vacated and a new trial ordered. In O'Brien, the Solicitor General informed the Court that the Federal Bureau of Investigation had electronically monitored conversations with the defense attorney concerning an application relating to the territorial conditions of O'Brien's bail. Conversations were summarized in FBI logs but were not communicated to the attorneys for the Department of Justice. Again, the Court summarily vacated the conviction. The intrusions in Black and O'Brien were by agents said to be unconnected with the prosecution, and neither of the defendants was affirmatively misled about the nature of the government's case. The instrusions here were arranged and permitted by the prosecution itself and Bursey was deliberately deceived as to the strength of the state's case. If the former violate the right to counsel, of necessity must the later.

Weatherford and Strom argue that (1) this case involves "mere presence" of an informer at defense counsels, (2) no direct proof that disclosure was made to the prosecution was adduced with the result that (3) no actual prejudice to Bursey was shown and no constitutional violations made out.

1. Mere presence. The court of appeals properly concluded that as a factual matter this was not a case of "mere" or "inadvertant intrusion." App. A at 22, n. 5.

2. Proof of disclosure. As Black and O'Brien made clear, proof of actual disclosure is not an element of interference with the right to counsel and a fair trial. Nonetheless, the record shows that Weatherford had full knowledge of the entire defense tactic, that he not only had the opportunity to make disclosure to the prosecutor but did in fact consult with him prior to trial and later testified as the state's chief witness. Unless Weatherford or the prosecutor can be expected to condemn themselves out of their own mouths, a more convincing showing of disclosure could hardly be made.

3. Actual prejudice. Black and O'Brien and numerous other decisions of this Court have consistently held that proof of actual prejudice is not a condition for denial of the rights to counsel and a fair trial, e.g. Peters v. Kiff, 407 U.S. 493 (1972); Glasser v. United States, 315 U.S. 60 (1942); Estes v. Texas, 381 U.S. 532 (1965). But even if such was Bursey's burden, he carried it in this case. As the court of appeals found,

the prejudice to him included the denial of the opportunity to consider whether plea bargaining might be the best course,[1] to do a background check on Weatherford for purposes of cross-examination,[2] and to attempt to counter the devestating impact of eyewitness identification.

The court below was plainly correct in concluding that whenever the state "knowingly arranges or permits intrusions into the attorney-cleint relationship, the right to counsel is sufficiently endangered" to violate the Sixth Amendment. App. A at 21. The court was also correct in finding that the post-indictment deception practiced in this case by the government violated Bursey's right to a fair trial. Brady v. Maryland, 373 U.S. 83 (1963).

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1. Because he was deceived about the strength of the state's case, Bursey made no serious effort at plea bargaining prior to trial. Following Weatherford's testimony, however, a short recess was taken and his attorney discussed the possibility of entering a plea. The trial judge indicated that if a plea was entered Bursey would be sentenced to one year on each of the two counts against him to run consecutively. Bursey concluded that his plea bargaining position was diminished after the trial had started and rejected the proffered sentence.

2. Weatherford was subject to impeachment. Following the trial, Bursey's attorney learned that Weatherford had been arrested on a narcotics charge earlier in 1969 and that the charges were dismissed in consideration of Weatherford's doing undercover work for SLED.

II. There is no Conflict Among the Circuits.

Petitioners state in their reasons for granting the writ that there are conflicting decisions among the circuit courts concerning the use of undercover agents. No such cases appear, however, in argument. Bursey is unaware of any cases which in fact conflict with the holding of the court below.[1] The circuits seem uniformly to follow the principles set out in this case. Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 976 (1952); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 980, reh. denied, 349 U.S. 969 (1955); United States v. Rispo, 460 F.2d 963 (3rd Cir. 1972); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969) (per curiam); United States ex rel. Cooper v. Denno, 221 F.2d 626 (2nd Cir. 1955), cert. denied sub nom. Cooper v. Denno, 349 U.S. 968 (1955); Via v. Cliff, 470 F.2d 271, 275 (3rd Cir. 1972); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955); Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958); and, Marland v. Heyse, 315 F.2d 312, 313 (10th Cir. 1963). Also see, Hoffa v. United States, 385 U.S. 293 (1966).

1. In United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970) the agent "in no way acted on behalf of the government regarding" the defendant's trial. In United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) there was no "intrusion" while in United States v. Mosca, 475 F.2d 1052 (2d Cir. 1973), there was no opportunity for prejudice.

III. The Findings Below are not Clearly Erroneous.

The court of appeals correctly concluded that Strom's own decisions directly caused the violation of Bursey's constitutional rights. Strom recruited Weatherford, instructed him to infiltrate the University, participated in the decision to maintain his cover after the draft board incident, entrusted the details of perfecting the cover to Weatherford and the prosecutor, instructed and allowed Weatherford to continue as an agent on the same assignment at the University after Bursey's arrest and indictment even though he knew that at "some point in time" he would "have to let . . . [Weatherford] testify," conferred with Weatherford on a regular basis, and concurred personally in the decision to allow Weatherford to take the stand against Bursey. The finding that Strom was directly connected with the unlawful acts of Weatherford is clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

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